IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL J. CONRON,	*	
Plaintiff,	*	
v.	*	Civil Action No. RDB-08-45
NOVATEC, INC., *et al.*,	*	
Defendants.	*	
	*	

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MEMORANDUM OPINION

Plaintiff Michael J. Conron ("Conron" or "Plaintiff") filed this Amended Complaint (Paper No. 10) against Defendants Novatec, Inc. ("Novatec"), Novatec, Inc. 401K Plan ("Novatec 401K"), and Novatec, Inc. Supplemental Executive Retirement Plan ("Novatec SERP") (collectively, "Defendants"), alleging four separate counts. In Count I (disparate treatment) and Count II (disparate impact), Plaintiff alleges wrongful termination of employment due to discrimination based on age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. (Compl. ¶ 1.) Counts III and IV are actions under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*., for allegedly improper and unlawful distributions and contributions of benefits, as well as for alleged violations of various plan provisions.[1] (*Id.*)

[1] Plaintiff's original Complaint contained six counts. Count V of the original Complaint was specifically directed at Defendant Novatec 401K, but Count V and the allegations contained therein have not been included in the Amended Complaint. In fact, there is no specific reference to Novatec 401K in the Amended Complaint, except for the fact that Plaintiff has included Novatec 401K as a named Defendant. It appears that Plaintiff, in his amendments, should have

Pending before this Court is Defendants' Motion to Dismiss and Motion to Strike (Paper No. 8). The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2008). For the reasons that follow, Defendants' Motion to Dismiss Count II is DENIED, Defendants' Motion to Dismiss Counts III and IV is GRANTED, and Defendants' Motion to Strike is DENIED.

BACKGROUND

Bound to accept all well-pleaded allegations as true, this Court has taken the following factual allegations largely from Plaintiff's Amended Complaint. From June 1985 through August 2006, Conron worked for Novatec, eventually attaining the positions of Chief Financial Officer and Vice President - Finance. (Am. Compl. ¶ 9.) In May 2006, as a result of a merger with SMS Merger Sub, Inc., new ownership took control of Novatec. (*Id.* ¶ 11.)

The new ownership allegedly conducted inquiries into many aspects of Novatec's operations and, as a result, became aware of each employee's age, medical condition, salary, and cost of healthcare coverage. (*Id.* ¶¶ 13-14.) Specifically, new ownership allegedly learned of Conron's age and prior medical conditions, including two previous cancer diagnoses and a cardiac condition. (*Id.* ¶¶ 16, 21.) Within months of the new ownership taking control, Novatec systematically terminated (a) older employees, (b) higher paid older employees, (c) older

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recaptioned his Amended Complaint to include only Novatec and Novatec SERP. Novatec 401K will be dismissed from this action in the accompanying Order because of the lack of any substantive allegations against it.

Alternatively, to the extent that Plaintiff intended to pursue claims against Novatec 401K in Counts III and IV of the Amended Complaint, his claim fails for the same reasons his claim fails as to Novatec SERP—the exhaustion provisions in the two plans are the same, and Plaintiff has not utilized them. (*See* Defs.' Mem. Supp. Mot. Dismiss, Exs. C, D.)

employees with serious medical conditions, and (d) older employees whose insured family members suffered from serious medical conditions. (*Id.* ¶ 17).

In August 2006, allegedly after months of continued and consistent pressure to retire or quit, Conron contends that Novatec wrongfully and unlawfully terminated him after twenty-one years of outstanding job performance and despite remaining qualified for his position. (*Id.* ¶ 18-19.) Conron was seventy-one years old at that time of termination, and his position was allegedly given to a newly hired younger employee. (*Id.* ¶¶ 20-23.)

In addition to Conron's allegations regarding his termination, Conron asserts that (as required by the plan provisions of Novatec SERP) Novatec and Novatec SERP failed to contribute 2% of Plaintiff's salary to his SERP account. (*Id.* ¶¶ 27, 33, 36, 37, 45.) Conron alleges that at all relevant times, he was a qualified eligible employee, (*id.* ¶ 36) and that Novatec and Novatec SERP "violated and breached the terms of the Novatec SERP [plan] by terminating . . . [his] participation without his consent, which was required by Article XI, Section 11.1." (*id.* ¶ 46).

On July 20, 2007, Plaintiff filed an action with the U.S. Equal Employment Opportunity Commission charging employment discrimination in violation of the Americans with Disabilities Act and the Age Discrimination in Employment Act. Then, on October 8, 2007, Plaintiff received a dismissal and notice of right to sue from the EEOC. (*Id.* ¶ 7.) As a result of the EEOC's dismissal, on January 4, 2008, Plaintiff timely filed the present action, naming as Defendants Novatec, Novatec 401K, and Novatec SERP.

On February 27, 2008, Defendants filed the pending Motion to Dismiss and Motion to Strike. (Paper No. 8.) Then, on March 12, 2008, Plaintiff filed an Amended Complaint, alleging

that (1) Novatec wrongfully terminated his employment due to discrimination based on age in violation of the ADEA (Counts I and II), and that (2) Novatec SERP improperly and unlawfully made distributions and contributions of benefits and violated various plan provisions (Counts III and IV). (Paper No. 10.) Plaintiff filed a Response to Defendants' Motion to Dismiss on March 12, 2008 (Paper No. 9), and Defendants filed a Reply on March 25, 2008 (Paper No. 12).

STANDARD OF REVIEW

I. Motion to Dismiss

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Therefore, the court accepts all well-pleaded allegations as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 473 (4th Cir. 1997). A complaint must meet the "simplified pleading standard" of Rule 8(a)(2), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)).

Although Rule 8(a)(2) requires only a "short and plain statement," the Supreme Court of the United States recently explained that a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). The factual allegations contained in a complaint "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Thus, a

complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

While "notice pleading requires generosity in interpreting a plaintiff's complaint[,] . . . generosity is not fantasy." *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 191 (4th Cir. 1998). In considering a motion to dismiss, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments" nor "the legal conclusions drawn from the facts." *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) (citations omitted).

DISCUSSION

I. Motion to Dismiss

A. Count II - Disparate Impact under ADEA

In support of their Motion to Dismiss, Defendants argue that Plaintiff has not exhausted administrative remedies and, alternatively, that Plaintiff has not sufficiently stated a claim upon which relief may be granted because he failed to provide any statistical basis for his allegation. (Defs.' Mem. Supp. Mot. Dismiss 3-5.)

1. Exhaustion of Administrative Remedies

As to Defendants first argument, Plaintiff's disparate impact claim must be dismissed if it is beyond the scope of his EEOC charge. An individual alleging employment discrimination must exhaust all administrative remedies before properly filing suit in federal district court. *Talbot v. U.S. Foodservice, Inc.*, 191 F. Supp. 2d 637, 640 (D. Md. 2002). It is well established that "the allegations contained in the administrative charge of discrimination generally operate to limit the scope of any subsequent judicial complaint." *Evans v. Technologies Applications &*

Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996) (citing *King v. Seaboard Coast Line R.R.*, 538 F.2d 581, 583 (4th Cir. 1976)).

The plaintiff, however, is not strictly limited to the precise wording of his formal EEOC charge, but instead may litigate all claims of discrimination that should be uncovered in a reasonable EEOC investigation of that charge. *Talbot*, 191 F. Supp. 2d 637, 639-40 (D. Md. 2002) (citing *Hubbard v. Rubbermaid Inc.*, 436 F. Supp. 1184, 1189 (D. Md. 1977). Moreover, Courts liberally construe EEOC charges and have consistently offered two reasons to do so. *Cooper v. Virginia Beach Fire Dept.*, 199 F. Supp. 2d 451, 456-57 (E.D. VA. 2002) (citing *Hubbard*, 436 F. Supp. at 1188-89). First, complaints to the EEOC are generally filed by lay persons uninformed of their specific legal rights and, second, the predominant purpose of an EEOC filing is to put defendants on notice of potentially viable claims and to screen out spurious ones. *Id.*

In light of the liberal construction afforded EEOC complaints, Plaintiff's charge of discrimination adequately encompasses a disparate impact claim and therefore will not be dismissed. In his EEOC charge, Plaintiff alleges that new ownership became aware of his *and other* employees' and family members' ages and serious medical conditions. (*See* Defs.' Mem. Supp. Mot. Dismiss, Ex. B.) Moreover, Plaintiff contends that in addition to his own discharge, several other employees over the age of 40 with serious medical conditions have been discharged as a result of the same alleged policy. *Id.* Based on the above facts, Plaintiff put the Defendants on adequate notice in his charge of discrimination that his claim involved a policy that implicated himself and other members of the workforce. Therefore, this Court finds that Plaintiff exhausted his administrative remedies on Count II

2. Sufficiency of the Amended Complaint

By its nature, a disparate impact claim alleges that some employment practices or actions, which may appear facially neutral in their treatment of different groups, may in fact manifest themselves as intentional discrimination against a protected class. *See Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 987 (1988); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-336 (1977). Defendants correctly recognize that the Supreme Court has held that recovery on a disparate impact claim is narrower under the ADEA than under Title VII. *See Smith v. City of Jackson*, 544 U.S. 228 (2005).

Defendants argue that the burden on the plaintiff for a disparate impact claim under the ADEA is a stringent one and that Plaintiff has not met this burden because he has not (1) isolated and identified a specific employment practice, or (2) shown causation by offering statistical evidence. *Axel v. Apfel*, 171 F. Supp. 2d 522, 526 (D. Md. 2000) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)). As to Plaintiff's necessary showing, however, the cases cited by Defendants are almost entirely cases involving the allegations and statistics necessary to survive a motion for summary judgment, not a motion to dismiss.

In Plaintiff's Complaint, he alleges that Defendants have "engaged in systematic termination of employees over the age of 40, older employees with serious medical conditions, older higher paid employees, and older employees whose insured family members suffer from serious medical condition." (Am. Compl. ¶ 31.) In order to support this allegation, Plaintiff claims that Novatec's new ownership reviewed employees' medical insurance coverages and claim histories, as well as their ages, medical conditions, and disabilities. (*Id.* ¶¶ 13, 14.) Allegedly, as a result of these inquiries, new ownership began a policy based on costs associated

with employment, that resulted in the termination of older employees. (*Id.* ¶ 17.) These allegations are specific enough to withstand a Motion to Dismiss.

Plaintiff has adequately stated the causation requirement in this Amended Complaint by alleging that the employment practice described above directly led to Plaintiff's termination. To demonstrate causation at the pleadings stage, Plaintiff is not required to perform a statistical analysis. Without the benefit of discovery and access to employment records, such an analysis is virtually impossible and would essentially prevent litigants from pursuing disparate impact claims under the ADEA.

Therefore, at this stage of the litigation, Plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 127 S. Ct. at 1974, and Defendants' Motion to Dismiss Count II is DENIED.

B. Counts III and IV - ERISA, 29 U.S.C. § 1132

In Count III, Plaintiff alleges that the plan provisions of Novatec SERP required Defendant Novatec to contribute 2% of a qualified employee's salary to Plaintiff's Supplemental Executive Retirement Plan and that Novatec failed to make the required contributions after June 30, 2006. (Am. Compl. ¶¶ 36-38, 45.) In Count IV, Plaintiff claims that Defendants violated the terms of Novatec SERP by terminating Plaintiff's participation without his consent. Defendants, however, argue that both Counts III and IV should be dismissed for failure to exhaust administrative remedies.[2] (Defs.' Mem. Supp. Mot. Dismiss 13.)

It is well established that a plan participant seeking benefits exhaust administrative

[2] As mentioned previously, Counts III and IV of the Amended Complaint do not state a claim against Defendant Novatec 401K and therefore Novatec 401K will be dismissed from this action.

remedies before filing an ERISA suit is well settled in the Fourth Circuit.[3] *See Smith v. Sydnor*, 184 F.3d 356, 361-62 (4th Cir. 1999) (finding that a plaintiff must exhaust his administrative remedies before filing a claim in federal court where the basis of the claim is denial of benefits); *Makar v. Health Care Corp. of Mid-Atl.*, 872 F.2d 80, 82-83 (4th Cir. 1989) (noting that while ERISA does not contain an explicit exhaustion provision, an ERISA claimant generally is required to exhaust the remedies provided by the employee benefit plan as a prerequisite to an ERISA action under 29 U.S.C. § 1132). ERISA requires benefit plans to provide internal dispute resolution procedures for participants whose claims for benefits have been denied. 29 U.S.C. § 1133. Congress's intent in requiring benefit plans to mandate internal claims procedures was "to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of benefit claims; provide a nonadversarial dispute resolution process; and decrease the cost and time of claims settlement." *Rego v. Westvaco Corp.*, 319 F.3d 140, 150 (4th Cir. 2003) (quoting *Makar*, 872, F.2d at 83) (internal citations omitted).

In the present case, Plaintiff's plan requires "[a]ll requests for benefits . . . shall be submitted in writing by the person requesting the benefit" to the Committee and the "Committee shall mail or deliver to the claimant written notice of its decision regarding the claim. If a claim is denied in whole or in part, such written notice shall set forth" the reasons for the denial. (Defs.' Mem. Supp. Mot. Dismiss, Ex. D, 10.) The "Committee" is defined as the Board of Directors of the Company, or others so appointed by the Board of Directors. (*Id.*, Ex. D, 2) Moreover, in regards to a review of the denial, the claimant within ninety days must file written

[3] An ERISA claim for a breach of fiduciary duty does not require an exhaustion of administrative duties. *Smith*, 184 F.3d at 362. Plaintiff, however, has not pled a breach of a fiduciary duty claim.

notice of a request for review with the Committee and the Committee shall give the claimant the opportunity to inspect all documents and further submit documents in support of the claim. *(Id.*, Ex. D, 10.) After reviewing the request for review, the Committee shall give its written decision to the claimant. (*Id.*)

Plaintiff's only request for benefits came in an e-mail dated February 2, 2007, to Liz Pypa. (Am. Compl., Ex. D.) Plaintiff does not assert that Ms. Pypa was a member of the Committee assigned by the Board of Directors. Furthermore, Plaintiff does not allege that he filed a request for a written review as required under Novatec SERP § 10.2. Therefore, as Plaintiff has not alleged that he has complied with the Novatec SERP plan requirements, this Court finds that Plaintiff has not exhausted his administrative remedies.[4]

Accordingly, because Plaintiff has not alleged that he has exhausted his administrative remedies, the Defendants' Motion to Dismiss Counts III and IV are GRANTED.

II. Motion to Strike

Defendants move pursuant to F.R.C.P. 12(f) to strike from Plaintiff's Complaint all references to Plaintiff and other employees' medical conditions. (Defs.' Mem. Supp. Mot. Dismiss 15.) Defendants argue that Plaintiff's description of his and other employees' medical conditions relate to an ADA claim, which the Plaintiff has not plead, and therefore should be

[4] Plaintiff's categorization of Defendants' argument as one involving Rule 9(c) of the Federal Rules of Civil Procedure is not entirely accurate. (Pl.'s Mem. Opp. Mot. Dismiss 8-9.) Defendants' argument is not entirely procedural; Defendants' argument is that Plaintiff has not plead sufficient facts to demonstrate that he met the substantive requirements to file an ERISA lawsuit. 29 U.S.C. § 1133. Therefore, Plaintiff's addition of boilerplate paragraphs 40 and 47 (which mirror the language contained in Rule 9(c)) do not remedy the Plaintiff's failure to allege facts indicating that he exhausted administrative remedies as required specifically under 10.1 and 10.2 of Novatec SERP.

stricken because the "immaterial and impertinent allegations have no bearing on this case." (*Id.*)

In certain circumstances a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The Fourth Circuit has made it clear that Rule 12(f) motions are generally viewed with disfavor "because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1380, 647 (2d ed.1990)) (internal citations omitted) (noting that a defense that might confuse the issues in the case should be deleted).

Contrary to Defendants' suggestion, Plaintiff's use of his and other employees' medical information is directly related to Count II, which asserts a disparate impact claim under the ADEA. Plaintiff alleges that Defendants gathered this information in order to develop its policy of systematically terminating employees with the highest medical claims, which had an disproportionate effect on employees over the age of 40. (Am. Compl. ¶¶ 13-17, 29-34.)

Therefore, Plaintiff's reference to his and other Novatec employee's medial conditions is material and pertinent. Accordingly, Defendants' Motion to Strike all information in the Complaint related to employees' medical conditions is DENIED.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. Defendants' Motion to Dismiss Count II is DENIED. Defendants' Motion to Dismiss Counts III and IV is GRANTED. In addition, Defendants' Motion to Strike is DENIED. Accordingly, Counts I and II shall proceed to discovery. A separate Order follows.

Date: June 23, 2008

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL J. CONRON,	*	
Plaintiff,	*	
v.	*	Civil Action No. RDB-08-45
NOVATEC, INC., *et al.*,	*	
Defendants.	*	
	*	

* * * * * * * * * * * * *

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 23rd day of June, 2008, ORDERED, that:

1. The Motion to Dismiss and Motion to Strike filed by Novatec, Inc., Novatec, Inc. 401K Plan, and Novatec, Inc. Supplemental Executive Retirement Plan (Paper No. 8), is DENIED IN PART and GRANTED IN PART, as follows:
   a. The Motion to Dismiss is DENIED as to Count II; and
   b. The Motion to Dismiss is GRANTED as Counts III and IV; and
   c. The Motion to Strike is DENIED;
2. Defendant Novatec, Inc. and Novatec, Inc. Supplemental Executive Retirement Plan are instructed to answer the Complaint within 20 days of the date hereof;
3. Defendant Novatec, Inc. 401K is hereby DISMISSED from this action; and

4. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for the parties.

/s/
Richard D. Bennett
United States District Judge